IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 14

JOSEPH F. BLACK, ASSISTANT REGIONAL COMMISSIONER, ALCOHOL AND TOBACCO TAX DIVISION (DALLAS REGION), INTERNAL REVENUE SERVICE,

Petitioner,

versus

MAGNOLIA LIQUOR COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

MOISE S. STEEG, JR.,
STEEG, SHUSHAN AND PRADEL,
Attorneys for Magnolia Liquor Co., Inc.,
Respondent.
313 Richards Building,
New Orleans, La.,

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QUESTION PRESENTED.

The sole question in this matter is whether tie-in sales by a wholesale liquor dealer licensed under the Federal Alcohol Administration Act constitute a violation of the provisions of Sections 5(a) and 5(b) of the Act.[1]

[1] 27 U. S. C. 205 (a) and (b).

STATEMENT.

Magnolia Liquor Company, Inc., respondent, is engaged in the wholesale liquor business in New Orleans, Louisiana and as such holds a basic permit pursuant to the Federal Alcohol Administration Act. During 1952, administrative proceedings seeking the revocation of this permit were instituted on the ground that:

a) Each and every sale made by respondent to ten named retailers from December 1, 1950 to March 31, 1951 were tie-in sales constituting a wilful violation of Sections 5(a) and 5(b) of the Act to such an extent as substantially to restrain and/or prevent transactions in interstate commerce, and that

b) Respondent was guilty of wilful infraction of certain technical record keeping requirements of the Act.[2]

The Hearing Officer found adversely to respondent on both charges and recommended a suspension of the permit for a period of forty-five (45) days.[3] Upon administrative appeal, the Director of the Alcohol and Tobacco Tax Division reversed the Hearing Officer as to the second count,[4] affirmed him as to the first count, and reduced the sanction to a suspension of fifteen days.[5] Upon appeal to the United States Court of Appeals for the Fifth Circuit

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[2] R. 2-5. The exact language is quoted in Appendix "A" with our emphasis added.

[3] R. 188.

[4] R. 152-155.

[5] R. 135-156.

the decision of the Director of the Division was set aside and reversed on the ground that tie-in sales are not prohibited by Sections 5(a) and 5(b) of the Federal Alcohol Administration Act. *Magnolia Liquor Co., Inc., v. Black*, 231 F. (2d) 941 (1956).

Although the issue now presented is primarily one of statutory interpretation, because of the wide variance between the presentation of the facts by petitioner and the statement of the case by the Court below (and the interpretation of the facts by respondent), we restate them here.[6]

Respondent is the exclusive wholesale distributor of Seagram products in the greater New Orleans area; it is likewise the distributor of other brands and other lines. Respondent does a gross annual business of approximately $6,000,000 and serves some twenty-six hundred (2600) retailers. A Special Investigator of the Alcohol and Tobacco Tax Division interviewed twenty-eight of these retailers to determine if respondent was participating in tie-in sales. The Investigator testified that in his effort to ascertain tie-in sales, he selected isolated and unrelated invoices for the purpose of demonstrating a pattern of sales. As a result of this investigation, ten retailers were named in the rule to show cause; of these, only eight were called as witnesses; from these eight, just seven gave testimony from which the Examiner found that they had bought plentiful items in order to obtain scarce items. Two of

[6] This statement of fact is a liberal adoption and reorganization of the language of the opinion of Circuit Judge Jones. Where facts have been added, reference to the record has been made.

these seven sales were made by representatives of the distiller—not by respondent, who merely filled an order placed with them by the distiller's representative.[7] One of the sales characterized as having been made on a "tie-in basis" was not established by the proof.[8]

Some of the witnesses testified that they had to buy Seagram 7 Crown or Seagram Gin (plentiful items) to get Seagram VO or Johnny Walker Scotch (scarce items); one said he was required to buy Seagram Gin to get Seagram 7 Crown (both plentiful items).

During the period involved, respondent sold 7,067 cases of Seagram VO, 29,049 cases of 7 Crown and 2,050 cases of Gin. The volume of the items in the so-called tie-in sales was 26 cases of Seagram VO, 5 cases of Scotch and 64½ cases of Seagram 7 Crown and 12 cases of Seagram Gin.[9]

The retailers involved in these alleged tie-in sales all testified that they were not subject to any domination or control by the respondent and that they carried in inventory and bought such other brands as their business required.[10]

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[7] R. 100, 33, 58.

[8] The Head of the Division, acting as Appellate Officer, so held. R. 149.

[9] An analysis of the proof regarding the extent of tie-in sales is found in detail in Appendix "B", infra.

[10] Gillen, R. 27, 28; Lopiccolo, R. 37; Argy, R. 43, 44. Trosatly, R 50, 51; Crosby, R. 55, 56; New, R. 63; Sinopolis, R. 67; Lopiccolo, R. 35; Gillen, R. 26; Argy, R. 42; Reba, R. 46; Trosatly, R. 51; Crosby, R. 57; New, R. 63.

SUMMARY OF ARGUMENT.

The Federal Alcohol Administration Act was enacted after the repeal of prohibition and succeeded the Codes of Fair Competition, which regulated the industry until they were rendered unenforceable by the decision in *Schechter Poultry Corp. v. United States*, 295 U. S. 495. Section 5 of the Act is devoted to "unfair trade practices". This section does not expressly prohibit tie-in sales. (Letter by Treasury Department to Secretary Pro Tem of Senate dated August 15, 1947, Appendix D).

By application of the basic canons of statutory interpretation, tie-in sales should not be read into Sections 5(a) and 5(b) of the Act.

This statute carries with it both civil and criminal sanctions enforceable by the Government only, and is therefore a penal statute. Black, "*Construction and Interpretation of the Laws*" (2nd Ed.), p. 472. As such it should be strictly construed, but in so doing the language should be interpreted so as to manifest the legislative intent.' *Securities and Exchange Commission v. Joiner*, 320 U. S. 344.

Although tie-in sales were a recognized trade practice at the time the Act was passed, they were never discussed on the floor of Congress nor were they included in the committee reports on the legislation. (See Appendix C). These discussions were limited to practices described as "Exclusive Outlet" and "Tied House".

The Section Headings use these terms in describing the offenses defined in the sections. It is proper to con-

sider such headings in interpreting a statute which is ambiguous. *Knowlton v. Moore*, 178 U. S. 41; *Maguire v. Commissioner*, 313 U. S. 1.

Tie-in sales were not the subject of discussion by Congress because the object of Sections 5(a) and 5(b) of the Act was to prevent domination and control of the retailer by the wholesaler. Whereas monopolistic control is implicit in an "Exclusive Outlet" or a "Tied House", such is not the case where tie-in sales are involved. Tie-in sales, such as charged in this case, limited in product and time, relate to the lessening of competition and abridgement of the choice of the retailer but not to his domination and control by the wholesaler. *Times Picayune Company v. United States*, 345 U. S. 594. This basic difference between "Exclusive Outlet" and "Tied House" on one hand and "Tie-In Sales" on the other demonstrates that the Congress did not intend that tie-in sales fall within the scope of Section 5 of the Federal Alcohol Administration Act.

It is argued by the Government that the statute should be enlarged to include tie-in sales because the Codes of Fair Competition were expanded by the statute to include partial exclusive outlets and tied houses and because the Congress declared that it hoped to stamp out "Exclusive Outlets" and "Tied Houses" in their incipiency. We argue to the contrary:

In 1947 the Secretary of the Treasury addressed a letter to the President Pro Tempore of the Senate, in which it was stated that the Treasury Department doubted whether tie-in sales were prohibited by the Act. The let-

ter goes on to request that this be remedied by passing an amendment to the statute which would specifically define and prohibit tie-in sales (Appendix D). Subsequently on two different occasions such an amendment was proposed in Congress. All three were rejected.

Therefore it appears that had it been the intent of the Congress to include tie-in sales as an unfair trade practice defined and prohibited by Section 5, it would have enacted the amendment submitted to it on three separate occasions to make this a definite provision of the law. Their failure to do so is a powerful indication that it was not their original intent to include tie-in sales under the Act.

Prior to the decision of the court below, the matter of *Distilled Brands v. Dunigan*, 222 F. (2d) 867 held that tie-in sales did constitute violation of Section 5 of the F.A.A. Act. This case is based upon the proper legal proposition that a contemporaneous and consistent administrative interpretation is entitled to weight in determining the meaning of an ambiguous statute. *Fox v. Standard Oil Company of New Jersey*, 294 U. S. 87. This is a major argument of the Government, which relies heavily on the *Distilled Brands* case. The Court below distinguished the *Distilled Brands* case by pointing out that it did not have before it the language of the Congressional discussions or material and did not have before it the letter by the Treasury Department to the Senate (Appendices C & D). The court below properly determined that there was no contemporaneous and consistent administrative interpretation to act as to guide in interpreting the statute:

In 1946 the Treasury Department issued rules *nisi* against wholesalers charging violations of Section 5 alleging tie-in sales. None of these were brought to trial but all dismissed on stipulation. In our case the stipulation provided that it should not prejudice the respondent in future proceedings. (R. 9). Then, in 1947 the Department wrote Congress the letter referred to above. Twice, subsequently, it tried to obtain an amendment to the statute, providing a specific definition of tie-in sales and making them a violation of the Statute. It issued no interpretation, no directive, no definition of or regulation relating to tie-in sales from 1935 when the F.A.A. Act was enacted to 1946 when the stipulations were entered into; or from 1947 when the letter was written, to 1952 when this case arose. Such conduct is not indicative of any contemporaneous, consistent or forceful position of the administrative agency which should carry great weight with the Courts.

It is respondent's position that Sections 5(a) and 5(b) of the Federal Alcohol Administration Act does not expressly prohibit tie-in sales; that upon application of these recognized canons of statutory interpretation there appears no basis upon which to enlarge the scope of the Act to include such a practice.

ARGUMENT.

Tie-In Sales Are Not Expressly Prohibited By Act:

After repeal of the Eighteenth Amendment, the alcohol beverage industry was regulated by the Codes of Fair Competition adopted under the National Industrial

Recovery Act. These Codes dealt with specific unfair trade practices peculiar to the liquor industry, and provided:

> "ARTICLE V—UNFAIR METHODS OF COMPETITION (EXCLUDING PRODUCTS OF THE BREWING INDUSTRY)
>
> "The following practices constitute unfair methods of competition and shall not be engaged in with respect to alcoholic beverages by any member of the industry. Such practices shall not apply to the distribution of the products of the brewing industry.
>
> * * *
>
> "Sec. 11. EXCLUSIVE OUTLETS.—To exact or require, by contract, understanding, or otherwise, that any trade buyer, who is engaged in the sale of alcoholic beverages at retail for consumption on the premises, handle or sell only the products of a particular member of the industry."

After the *Schechter* case,[11] when the Codes became unenforceable, Congress undertook intensive study of the problems relating to the regulation of the liquor industry. Trade practices were given serious consideration in connection with the proposed legislation, and were discussed in detail on the floor of the Congress and in both the Senate and House reports.[12] When the Statute was enacted, Section 5 was devoted to "Unfair Trade Practices".

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[11] **Schechter Poultry Corp. v. United States, 295 U. S. 495.**

[12] We have quoted these provisions in full in Appendix "C". All emphasis are ours.

Section 5 does not expressly prohibit tie-in sales.[13]

Section 5(a) deals with "Exclusive Outlets" and Section 5(b) deals with "Tied Houses". In order for sanctions to be asserted against respondent as charged, it is necessary that the language of Sections 5(a) and 5(b) of the Act be construed to apply to that conduct which would constitute a tie-in sale as defined by the Treasury Department, thus:

27 U.S.C.A. 205(a)	27 U.S.C.A. 205(b)	27 U.S.C.A. 205(c)
It shall be unlawful for any person engaged in business as a . . . wholesaler, of distilled spirits, wine, or malt beverages, . . .	It shall be unlawful for any person engaged in business as a . . . wholesaler, of distilled spirits, wine, or malt beverages, . . .	It shall be unlawful for any person engaged in business as a . . . wholesaler, of distilled spirits, wine, or malt beverages, . . .
EXCLUSIVE OUTLET	**"TIED HOUSE".**	**COMMERCIAL BRIBERY**[14]
To require, by agreement or otherwise, that a retailer engaged in the sale of distilled spirits, wine, or malt beverages, purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce . . .	To induce through any of the following means any retailer, engaged in the sale of distilled spirits, wine, or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce. . . . (7) by requiring the retailer to take and dispose of a certain quota of any of such products; . . .	To induce any trade buyer engaged in the sale of distilled spirits, wine or malt, beverages to purchase any such products from such person; . . . . . . (3) by conditioning the purchase of any distilled spirits, wine, or malt beverages upon, or "tying in" such purchase with the purchase of any other distilled spirits, wine or malt beverages.

[13] The Treasury Department expressed this view in their letter of August 15, 1947 addressed to the President Pro Tempore of the Senate. The full text of this letter is found in Appendix "D" of this brief and Appendix "B", p. 31 of the Government's brief.

[14] This definition is found in the letter by the Treasury Department to the Senate dated August 15, 1947, Appendix "D".

The Statute Should Not Be Broadened by Construction:

Section 5 of the Act carries with it both civil and criminal penalties.[15] Only the Government has the right to enforce the Statute, and there are no provisions affording a civil remedy to an aggrieved party. Therefore, we urge that the offenses proscribed by the Act should be confined to those specifically and unequivocally defined by the express language of the Statute itself:

> "In general it is said that when a prohibitory act gives the right to enforce the penalty for its violation to the party aggrieved, it will be construed as remedial in its nature; but it is a penal act when such right is given to the public or the government."
>
> Black, "*Construction and Interpretation of the Laws*" (2nd Ed.), at p. 472.

A penal statute should be strictly construed. *United States v. Wiltberger*, 5 Wheat. 76; *Huntington v. Attrill*, 146 U. S. 657; see, *Tiffany v. Missouri National Bank*, 18 Wall. 409; *Providence Steam Engine Co. v. Hubbard*, 101 U. S. 188.

In *Trenton Beverage Co. v. Berkshire*, 151 F. (2d) 227 (C. C. A., 3rd, 1945), the Treasury Department sought the revocation of a wholesaler's basic permit, alleging that the wholesaler violated the Emergency Price Control Act. In holding conditioning of a basic permit upon compliance with "federal laws" did not include laws not relating specifically to the beverage industry, the Court stated that the

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[15] Civil - 27 U. S. C. 204; Criminal - 27 U. S. C. 207.

Federal Alcohol Administration Act should be strictly applied:

> "Finally, we observe that under the decisions of the Supreme Court, the penalty provisions of the Alcohol Act should be construed rather strictly. . . ." (151 F. (2d) 227, at p. 229).

The best discussion that we are able to find of the principles of statutory interpretation applicable to such a Statute is in the matter entitled *Securities and Exchange Commission v. Joiner*, 320 U. S. 344. This case involved the construction of the Securities and Exchange Act. It was urged that because violations of the S.E.C. Act involved "crimes", it should be interpreted with strictness. Mr. Justice Jackson, as the organ of the Court, reviewed the jurisprudence on this subject. He pointed out that there are decisions which require strict construction; that there is a vast array of authorities which consider the Statute remedial; that there are others which are inclined to a strict construction when a criminal penalty is being imposed and a liberal one when civil remedies are being applied. He then goes on to say:

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. * * * It is said, that notwithstanding this rule, the intention of the law-maker must govern in the construction of penal, as well (as) other statutes. This is true. But this is not a new independent rule, which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as

to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases, which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend."

United States v. Wiltberger, 5 Wheat. 76, 95, 5 L. Ed. 37.

"This rule in substance was repeated in United States v. Hartwell, 6 Wall. 385, 396, 18 L. Ed. 830, which said also:

"The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent."

Under this canon of statutory interpretation, we believe that in a case such as this the offense charged should lie squarely within the language of the Statute.[16]

There is nothing in the expressed legislative policy relating to this Statute to indicate that Congress gave the

[16] There is a great mass of jurisprudence relating to the subject of strict and liberal interpretation of statutes. Some of this is reviewed in the **Joiner case, supra.** The **Joiner** case provides, as is quoted in the body of the brief, that the object of statutory interpretation is to reach the legislative intent. We reconciled in our minds the determination of legislative intent and the strict interpretation of a statute as one which will give full force to the words and language of an Act without expanding it beyond its definite scope.

remotest consideration to tie-in sales when considering the trade practices to be prohibited by Section 5 of the F.A.A. Act.

Headings of Sections 5(a) and 5(b) Do Not Designate Tie-in Sales:

The heading of a section of a statute, while not conclusive, is proper to be considered in interpreting the statute where ambiguity exists.[17] Section 5(a) is entitled "Exclusive Outlet" and Section 5(b) is entitled "Tied House". "Tie-in Sales" is not synonymous with either "Exclusive Outlet" or "Tied House" and their omission from the headings is therefore of significance.[18]

Congress Did Not Intend to Prohibit Tie-in Sales by Section 5 of the Act:

Not only did Congress not designate the Section in question as prohibiting tie-in sales, but in its discussion of the Statute, tie-in sales were never mentioned. When the Federal Alcohol Administration Act was passed, Congress was intent upon preventing the recurrence of specific trade practices which had created certain evils leading to prohibition. It is true that the language of the Statute and

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[17] **Knowlton v. Moore**, 178 U. S. 41; **Maguire v. Commissioner**, 313 U. S. 1.

[18] In its footnote at p. 22, it is argued in petition that the weight of these headings should be minimized as a factor in statutory interpretation. We have not and do not urge that these headings are exclusive or binding. But the cases cited by the Government are clearly not applicable here for the section headings were given special consideration by the legislature when considering the Act; they were the very basis of the discussions. See Appendix "C", cf. **Hadden v. McColleck**, 5 Wall 107. Further, the text is not complicated; it consists of three brief paragraphs. cf. **Railroad Trainmen v. B. L. O. R. Co.**, 331 U. S. 519.

the language of the Codes differ, and that the "Tied House" provision was an added provision. It is further true that Congress hoped to prevent the reprobated trade practices "in their incipiency"—but what Congress set out to prevent were situations of monopolistic control of the retail outlet by the wholesaler.[19] Domination and control is implicit in the concepts of "Exclusive Outlet" and "Tied House".

However, in "Tie-in Sales" the gravamen is not so much control, but rather the "suppression of competition"[20] because such sales cause the "abdication of the buyer's independent judgment as to the tied products' merits.[21]

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[19] We have quoted as far as possible the full language of the House Report, the Senate Report and other references to Section 5 in our Appendix "C". A reading of the full language and not isolated provisions out of context, such as "in its incipiency" and practices "analogous to those prohibited by the anti-trust laws", will sustain our basic contention that the primary reason for Sections 5(a) and 5(b) is to prohibit practices tending to product monopolistic control by wholesalers of retail outlets, and that there is considerable reference to "Exclusive Outlets" and "Tied Houses" by the Congress but none to "Tie-in Sales".

[20] **Standard Oil of Calif. v. U. S.**, 337 U. S. 293 at p. 305.

[21] **Times-Picayune Pub. Co. v. U. S.**, 345 U. S. 594 at p. 605. This position is substantially supported by the argument of the Government that where there is a tie-in sale it is assumed that the sale of another product is excluded from the market. There is considerable discussion of this phase of tie-in sales in the Government's brief but we find no discussion as to how exclusions can constitute an incipient monopoly. Pp. 13-15 of Petitioner's brief. As a matter of fact, such an assumption is refuted by the testimony of the witnesses in this case. In effect they testified, in some cases, that the purchase of the combination of products did not interfere with the purchase of other products; some testified that the effect of the combination purchase was merely to delay future purchases of Respondent's product, and competitors testified that they sold whatever they had on hand, and accordingly, we do not see where there was any lessening of competition by the so-called "Tie-in Sales". See Footnote No. 10.

The development of "Tied-in Sales" as an unfair trade practice relates primarily to the lessening of competition, and has been developed by a series of cases over the years and in connection with those Statutes relating to the regulation of commerce, such as the Federal Trade Commission Act, the Sherman Anti-Trust Statute and the Robinson-Patman Act.[22] It cannot be argued, however, that Congress did not have reason to know of the existence of tie-in sales when the F.A.A. Act was under consideration. This Court had held in *Federal Trade Commission v. Gratz*, 253 U. S. 421 (1920) that tie-in sales were not illegal *per se*, so Congress knew that tie-in sales might be practiced between liquor wholesalers and retailers. But Congress was concentrating on those situations where by threatening to exclude the retailer from all its resources, the wholesaler could exert undue control over the retailer's purchases—that is to say "Exclusive Outlets" and "Tied Houses"—not "Tie-In-Sales".

The essential difference between the three trade practices is best seen by illustration:

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[22] The F. A. A. Act was enacted in 1935. The concept of tie-in sales was developed through the following cases and the **Standard Oil case** (note 19 **Supra**) and **The Times-Picayune** case (note 20, **Supra**) were all decided after the F. A. A. Act was passed.

Landis Machinery Co. v. Chaso Tool Co., 141 F. (2d) 800 (6th Cir 1944) **cert. denied**, 65 S. Ct. 52, 323 U. S. 720 (1944). (Action for patent infringement, Clayton Act).

Mercoid Corp. v. Minneapolis-Honeywell Regulator, 320 U. S. 680 (1944). (Patent infringement).

International Salt Company v. United States, 322 U. S. 392, (1947). (Sherman Anti-Trust and Clayton Acts).

United States v. Paramount Pictures, 334 U. S. 131 (1948). (Sherman Anti-Trust Act).

Standard Oil Co. v. United States, 337 U. S. 293 (1949). (Clayton Act).

An EXCLUSIVE OUTLET is Where the Wholesaler Requires the Retailer to Handle or Sell Only the Products of the Wholesaler (Whether That Product is All or Part of the Retailer's Stock) as a Condition to Being Allowed to Buy From the Wholesaler.[23]

In other words, Section 5(a), EXCLUSIVE OUTLET, pertains to a situation where the wholesaler requires the retailer to buy absolutely all of the retailer's stock from the wholesaler; or where, if the wholesaler has only one line or brand, all of that particular line or brand from the wholesaler; or where the wholesaler requires the retailer to buy all of one type of liquor from him, such as all straight whiskeys, blended whiskeys, imported whiskeys, scotch—otherwise the wholesaler will not sell anything to the retailer.

A Tied House Is Where a Retailer Is Required to Take a Certain Quota of His Inventory From the Wholesaler As a Condition to Being Allowed to Buy From the Wholesaler:[24]

In other words, Section 5(b) TIED HOUSE, pertains to a situation where the wholesaler requires the retailer to acquire a definite proportion of his inventory purchases from the wholesaler as a condition to being allowed to buy anything from the wholesaler.

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[23] This is generally a restatement of the Codes of Fair Competition and consistent with the language of the House Report in (HR 8870) at p. II where the practice is called an "exclusive purchasing agreement".

[24] This is a paraphrase of the language used by Mr. Lewis of Colorado discussing the "tied house" provisions. See Appendix "C".

A Tie-in Sale Is the Conditioning or Tying in of the Purchase of One Product With the Purchase of Another Product.[25]

A TIE-IN SALE, such as in this case alleged, involves requiring the purchaser to buy a plentiful item in order to get a scarce item. But such conditioning does not foreclose the products of the wholesaler from the retailer; he can buy both products; he can still buy the plentiful item; he can buy anything else the wholesaler has; or he can refuse to buy at all. But there is no domination and control over the retailer by the wholesaler.

It is urged by counsel for the Government that tie-in sales should be read into the Statute because Congress declared it was the purpose of the Statute to prevent monopolistic control "in its incipiency". However, we know that on at least three occasions, Congress had an opportunity to be certain that tie-in sales were a violation of the Statute and that Congress did not see fit to provide this certainty of language.

On August 15, 1947, the Under Secretary of the Treasury addressed a letter to Congress to the effect that the Treasury Department was in doubt that it could successfully impose sanctions for tie-in sales; that, therefore, it, the Treasury Department, requested an amendment to the Statute to provide in Section 5(c) express language prohibiting tie-in sales.[26] After this request, on two other occasions the Treasury Department caused amendments to be introduced into Congress, which amendments sought to

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[25] This is the definition contained in the letter referred to heretofore. Appendix "D".

[26] Appendix "D".

make tie-in sales a violation of the Statute. On each occasion, the proposed amendments were rejected.[27]

It is far more logical to reason, therefore, that if Congress had originally intended to prohibit tie-in sales by virtue of the "Exclusive Outlet" and "Tied House" provisions, when the agency in charge of the enforcing of the Act was in doubt that it accomplished such avowed purpose, Congress would have clarified the ambiguity by enacting the proposed amendment. Since Congress did not do so, *a fortiori*, it was not their original intention to prevent tie-in sales by the use of Sections 5(a) and 5(b) of the Act.[28]

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[27] 93 Cong. Rec. 10570 (1947):

"AMENDMENT OF FEDERAL ALCOHOL ADMINISTRATION ACT, AS AMENDED

A letter from the Acting Secretary of the Treasury, transmitting a draft of proposed legislation to amend the Federal Alcohol Administration Act, as amended (with an accompanying paper); to the Committee on Finance.

H. R. 3248, 95 Cong. Rec. 1896 (1949):

"A bill to amend the Federal Alcohol Administration Act, as amended, to the Committee on Interstate and Foreign Commerce".

H. R. 7600, 98 Cong. Rec. 4446 (1952):

"A bill to amend the Federal Alcohol Administration Act, as amended, to the Committee on Interstate and Foreign Commerce".

[28] **See United States v. Bergh,** U. S. , 77 S. Ct. 106 1956 at p. 109, where the Court said:

". . . This opinion was followed consistently by all of the departments and agencies of the Government. **In this regard it is of importance to note that several efforts were made to repeal this interpretation by specific Acts of Congress, but in each instance the bill failed to pass. This contemporaneous interpretation of the 1938 Resolution by the agency charged with its supervision**—an interpretation followed by all agencies of the Government—**together with the acquiescence of the Congress, must be given great weight**". (Emphasis supplied).

There Is No Contemporaneous and Consistent Administrative Construction to Support the Decision in *Distilled Brands v. Dunigan:*

It is a major contention of the Government and is the basis of the holding in the case of *Distilled Brands v. Dunigan*, 222 F. (2d) 867 (C. C. A., 2nd, 1956) that there has been a settled administrative construction of the Act supporting their position. The contemporaneous interpretation of a Statute by the administrative agency charged with the responsibility of enforcing it is entitled to respectful consideration, although the Court has the right to disregard it. *Fox v. Standard Oil Company of New Jersey*, 294 U. S. 87 at p. 96. To be a help to the Court in finding the meaning of a Statute such administrative construction should be both contemporaneous and consistent.[29] Here it was neither.

In construing this statute, the Court in *Distilled Brands v. Dunigan*, said:

> "We agree with the position of the Division that tie-in sales do constitute a sufficient interference with competition to require prohibition within the regulatory scheme of the Federal Alcohol Administration Act, and that Section 5, 27 U. S. C., Section 205, actually covers such transactions. . . . We see no reason so to limit the statute. The broader reading given to Section 5 by the administrative tribunal below is in accordance with the

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See Alstate Construction Co. v. Durkin, 345 U. S. 13 at p. 17. "We decline to repudiate an administrative interpretation of the Act which Congress refused to repudiate after being repeatedly urged to do so."

[29] **See United States v. Bergh, Supra and Alstate Construction Co. v. Durkin, Supra.**

> construction put thereon by the Treasury Department since 1946. This construction is of considerable weight, particularly when it is so eminently reasonable in the light of the over-all purposes of this regulatory statute."

When the Second Circuit Court of Appeals took this position, it did not have before it the references to Congressional material or the letter addressed to Congress by the Treasury Department. Therefore, the court below, in treating with the *Distilled Brands* case said:

> "The opinion in Distilled Brands v. Dunigan, supra, gives to Section 5 the 'broader reading' of the administrative tribunal, and finds such to be in accord with 'the construction put thereon by the Treasury Department since 1946'. Since it does not appear from the opinion in the Distilled Brands case that the letter of the Acting Secretary was before the court, we assume that the court was entitled to find from the evidence before it that there had been a continuous and confident administrative construction consonant with its contention there and here asserted."

The court below had cogent reasons for not finding any contemporaneous and forceful administrative construction of this Statute to guide it:

> "Here we have the Alcohol and Tobacco Tax Division construing the Act in 1946 as prohibiting tie-in sales. But the Division had no such confidence then in its interpretation as to seek enforcement by sanctions. Instead, it sought stipulations.

It confessed its doubts as to whether violations could be established through tie-in sales. It recognized the contention of members of the industry that tie-in sales were not prohibited. It sought to have the doubt resolved by an amendment to the Act bringing tie-in sales within the prohibited practices. The Congress did not see fit to grant the administrative request. Counsel for the Government say to us that the simple introduction of a bill to amend a statute, without any further proceedings thereon, 'is without meaning for the purposes of statutory interpretation,' citing Order of Railway Conductors v. Swan, 469 , 329 U. S. 520, 67 S. Ct. 405, 91 L. Ed. 471. A recognition of such a principle would not preclude us, in our 'labors to discover the design' of the framers of the Act from seizing upon the expressed doubts of the Treasury Department as an aid to construction. The Division recognized that the language of Section 5 was ambiguous by not attempting, in 1946, to apply the sanctions of the Act to those making tie-in sales. There was a further recognition of the ambiguity in the letter from the Acting Secretary to the President Pro Tempore of the Senate. The doubt which was then recognized by the Treasury Department and its Alcohol and Tobacco Tax Division has not been dispelled from our minds. We resolve that doubt in favor of the appellant and hold that the Act does not prohibit tie-in sales."

In answer to this, the Government seeks to minimize the doubt expressed by the Treasury Department as a doubt born from the contentions advanced by the vari-

ous wholesalers and not a doubt based upon the weakness of the Statute. We submit that a reading of the letter will show that such is not the case. The letter says, in this order:

1. "The Treasury Department transmits an amendment to section 5 of the FAA Act designed to bring so called 'tie-in' sales within the prohibitions of the Act.
2. "In the absence of a provision in the Statute expressly dealing with 'tie-in sales', proceedings for revocation or suspension of basic permits were instituted instead of criminal action.
3. "These proceedings were dismissed on stipulation 'due to doubt' on the part of the Department as to whether violations of the Statute could be established through 'tie-in' sales.
4. "It was contended by members of the industry that 'tie-in sales' were not within the purview of the Act.
5. "The Act should be amended as definitely to vest the Department with authority to act on 'tie-in' sales."

Considering this letter, two other attempts to amend the Statute, and the stipulation entered into with respondent providing that it should not prejudice the respondent in any other proceedings,[30] we doubt whether there was any contemporaneous administrative interpretation to be considered in construing this Statute.

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[30] Government Exhibit 29, R. 9.

By way of summary, therefore, we believe that it was never the intention of the Congress that tie-in sales should be the basis of civil or criminal sanctions against a wholesaler charged with violations of Sections 5(a) and 5(b) of the Act because:

a) The heading of the Section did not include this particular offense;

b) In considering the legislation, Congress did not discuss or consider tie-in sales in connection with alcoholic beverage regulations;

c) The very nature and basis of tie-in sales is fundamentally different from the offense included in the Statute in that it relates to an interference with competition rather than with domination or control, and

d) Had Congress originally intended that tie-in sales should be prevented by Sections 5(a) and 5(b) of the Act, having been advised by the Treasury Department that they questioned the adequacy of the language of the Statute, Congress would have passed clarifying amendments thus erasing such doubt.

CONCLUSION.

It is respectfully submitted for the reasons above that the judgment of the United States Court of Appeals for the Fifth Circuit holding that tie-in sales are not a vio-

lation of the Federal Alcohol Administration Act is correct and should be affirmed.[31]

Respectfuliy submitted,

STEEG, SHUSHAN AND PRADEL,

MOISE S. STEEG, JR.,
313 Richards Building,
New Orleans, La.,
Attorneys for Magnolia Liquor Co., Inc.,
Respondent.

[31] In the event this Court does not affirm the decision as we have requested, this matter should be remanded to the Fifth Circuit Court of Appeals for further action. That court said: "The appellant, in addition to the contention that tie-in sales are not prohibited by the Act, urges other grounds for reversal. Some of these, we think, have merit but the view which we have taken makes a determination of them unnecessary".

APPENDIX "A"

1. You did willfully violate Section 5 of the Federal Alcohol Administration Act (Section 205, Title 27, United States Code) upon compliance with which (among other things) your wholesaler's basic permit (No. 10-P-784), issued pursuant to Section 4 of said Act, was conditioned, in that:

(a) Between December 1, 1950, and March 31, 1951, you did to such an extent as substantially to restrain and/or prevent transactions by other persons in interstate and/or foreign commerce in distilled spirits and/or wine, willfully engage in the practice of *requiring*, by agreement or otherwise, divers and sundry retailers engaged in the sale of distilled spirits and/or wine in Orleans, Jefferson, and St. Tammany Parishes, Louisiana, *to purchase from you with each purchase* of Johnny Walker's Scotch or Seagram's V. O. certain quantities of distilled spirits and/or wine to the exclusion in whole or in part of distilled spirits and/or wine sold and offered for sale by other persons in interstate and or foreign commerce, in violation of subsection (a) of Section 5 of the said Federal Alcohol Administration Act.

(b) Between December 1, 1950, and March 31, 1951, you did to such an extent as substantially to restrain and/or prevent transactions by other persons in interstate and/or foreign commerce in distilled spirits and/or wine, willfully engage in the practice of *inducing* divers and sundry retailers engaged in the sale of distilled spirits and/or wine in Orleans, Jefferson, and St. Tammany Parishes, Louisiana, to purchase from you distilled spirits and/or wine to the exclusion in whole or in part of distilled spirits and/or

wine sold or offered for sale by other persons engaged in interstate and or foreign commerce, by requiring such retailers *to take and dispose of a certain quantity* of such distilled spirits and/or wine *with each purchase* of Johnny Walker's Scotch or Seagram's V. O., in violation of subsection (b) of Section 5 of the Federal Alcohol Administration Act.

(c) The divers and sundry retailers referred to in the preceding paragraphs identified as 1(a) and 1(b) are:

Richard J. Gillen—t/a Pat's Bar, 2215 Jefferson Hwy., Jefferson Ph., La.

Sam Lopiccolo—t/a Jack's Inn, 7½ mile Post, Gentilly Road, New Orleans, La.

John Reba—t/a Front and Society Bar, 119 Exchange Place, New Orleans, La.

Frank Trosatty—t/a Frank's Bar, 751 St. Charles St., New Orleans, La.

Roy P. Brechtel—t/a Brechtel's Bar, 1509 S. Jeff. Davis Pkwy., New Orleans, La.

Jack New—t/a The New Bar, 8634 Pontchartrain Blvd., New Orleans, La.

Bing Crosby—t/a Bing Crosby's Liquor Store, 1756 Front St., Slidell, La.

Gus Argy—t/a Argy's Steak House and Bar, 119-121 University Place, New Orleans, La.

Paul B. Lemann—t/a Lafitte Hotel and Bar, 1003 Bourbon St., New Orleans, La.

Anthony Sinopolis—t/a Paramount Restaurant, and Bar, 733 Iberville St., New Orleans, La.

2. You did knowingly and willfully violate Section 1101, Title 18, and Section 2857, Title 26, United States Code,

and the regulations prescribed under such Section 2857 by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, upon compliance with which (among other things) your wholesaler's basic permit (No. 10-P-784), issued pursuant to Section 4 of the Federal Alcohol Administration Act, was conditioned in that:

(a) Between some day and date prior to December 1, 1950, the exact time being unknown, and January 31, 1952, while engaged in the business of a wholesale liquor dealer as defined by Section 2857, Title 26, United States Code, you through your officers, agents, servants, and employees, did willfully, knowingly, and unlawfully make false and fraudulent entries in records required to be kept by law and regulations, which records are commonly known as Wholesale Liquor Dealers' Record (Forms 52-A and 52-B), by showing in column 5 of such forms and record that certain distilled spirits were bottled, rectified or distilled at Rectifying Plant 153, which rectifying plant 153 is located at Lawrenceburg, Indiana, and by showing in column 6 of such forms and record that certain distilled spirits were bottled, rectified or distilled in Indiana, when in truth and in fact such distilled spirits, known as Seagram's V. O., were distilled and/or rectified and bottled in Canada; which false and fraudulent entries were made for the purpose of and with the intention to deceive the Supervisor, 10th District Alcohol and Tobacco Tax Division, formerly known as the Alcohol Tax Unit, Bureau of Internal Revenue, such entries relating to a matter within the jurisdiction of a department and agency of the United States.

APPENDIX "B"

The following summary of the sales to these 7 retailers is an effective display of the infinitesimal nature of the proof in this case:

	V. O.	7-Crown	Gin
1. Total of alleged sales to named retailers proven by Government	26	64¼	12
2. Total of all sales of similar Items by Permittee	7,067	29,049	2,050

Permittee's "Exhibit M" shows the relation of Permittee's total sales to the retailers named in the citation, and is repeated here for emphasis:

	Total Sales 12/1/50 to 3/31/51	Sales to Named Retailers	Percentage
V.O.	7,067	26	36/100 of 1%
7-Crown	29,049	64¼	22/100 of 1%
Gin	2,050	12	58/100 of 1%
Johnny Walker	1,485	5½	34/100 of 1%
Cordials	300	1	33/100 of 1%

But when related to total wholesale sales in Louisiana, the proportions become even more infinitesimal:

	All Sales Proven at Hearing	Total Purchases for 1951 by Wholesalers	Percentage
Cordials	1	32,770	.3/100,000 of 1%
Vermouth	5	12,344	4/ 10,000 of 1%
Gin	22	190,479	1/ 10,000 of 1%
7-Crown	142-1/8	527,692	27/100,000 of 1%

These computations do not include ten cases of gin and one hundred of Seagram 7-Crown sold to retailer Gillen on which he was granted a cash discount on the purchase.

Permittee Exhibit No. P-N

Total Number of Cases of Items Sold by Location Named in Citation During December, 1950, January, February and March, 1951 According to Government Proof.

	V.O.	7-Crown	Gin	Scotch	Cordials & Vermouth
Pat's Night Club, Richard Gillen	3	10		5	1 5
Jack's Inn, Sam Lopicolo	13½	41	6		
Front & Society Bar, John Reba	½		½		
Frank's Bar, Frank Trosatty	1	4¼			
Tortorich Rest. & Bar, Jack New	1	1			
Bing Crosby's	4	6	2		
Argy's Place, Gus Argy	3	1	2½		
Paramount Rest. & Bar, Tony Sinopoli		2		1/12	
Totals	26	64¼	12	5-1/12	1 5

This information is condensed from Permittee's Exhibits I, M and N, R. 12-15 inclusive.

APPENDIX "C"

HOUSE REPORT NO. 1542; 74th Congress, 1st Session 1935, 10

"Under the code system a voluntary code for the brewing industry (already in existence at the time of repeal as a result of 3.2 beer legislation of March 22, 1933) was approved by the President. At the same time, the President imposed codes upon the other alcoholic beverage industries, namely, the distillers, rectifiers, importers, wholesalers, and wine producers. By Executive order under the National Industrial Recovery Act the President established the Federal Alcohol Control Administration to administer these codes and certain related functions. *The bill embodies in statutory form so much of the former code system as the committee now deems appropriate and within the constitutional power of Congress to enact. In general, it may be said that the bill incorporates the greater part of the system of Federal control which was enforced by the Government under the codes.*"

SENATE REPORT NO. 1215; 74th Congress, 1st Session, (1935) 7

"The bill embodies in statutory form so much of the former code system as the committee now deems appropriate and within the constitutional power of Congress to enact. In general, it may be said that except with respect to malt beverages the bill as amended by the committee incorporates the greater part of the system of Federal control which was enforced by the Government under the codes."

CONGRESSIONAL RECORD, VO. 79, NO. 152, P. 12270; 74th Congress, 1st Session, (1933) 6, 7

"Mr. Lewis, of Colorado. Mr. Chairman, this is a further restriction on the so-called 'tied house', which is regulated under section 5(b) of this bill. Before prohibition, in our part of the country at least, one of the evils of the liquor traffic was that a retailer was required by the brewer or distiller to take a certain quota of beer or spirits of some private brand as a condition to being allowed to retail that brand. The temptation was often irresistible for the retailer to induce customers to buy drinks when they had already had quite enough. This was a very great evil, as I believe the members of the committee will concede. I think this is an important amendment to this bill. I hope the committee will accept the amendment."

H. R. 1542, 74th Congress, 1st Session (1935)

"The tied-house provisions, it should be noted, relate to the *acquisition by industry members of control over theretofore independent retail establishments and do* not prohibit industry members from continuing to operate retail outlets heretofore established by them and wholly owned and operated by them, nor the establishment by industry members of new retail outlets of such character."

Both committees reporting on HOUSE REPORT 8870 carefully explained the purposes of Section 5: Idem, p. 11.

"These prohibited practices fall in two general categories, those relating to *monopolistic control* of retail outlets and those relating to labeling and advertising."

"The House Bill (Sec. 5) prohibited 2 classes of trade practices. The first class of these prohibited practices were those which tended to produce monopolistic control of retail outlets, such as arrangements for *exclusive outlets*, creation of *tied houses*, commercial bribery, and sales on consignment with privilege of return. * * *

"The second class of unfair practices prohibited by the bill are those relating to false labeling and false advertising."

"Three other types of practices which are closely related to, and have *constituted additional means of effecting, the 'tied house'* are also prohibited. These *practices are exclusive* purchase agreements with retailers (sec. 5(a)); commercial bribery of a trade buyer, or the offering or giving of any bonus, premium or compensation to the officers or employees of a trade buyer (sec. 5(c)); and deliveries to a trade buyer on consignment or conditional sales, or sales with the privilege of return, or sales on any basis other than a bona-fide sale (sec. 5(d))."

"The foregoing practices have in this industry constituted the principal abuses whereby interstate and foreign commerce have been restrained and *monopolistic control* has been accomplished or attempted. The most effective means of preventing monopolies

and restraints of trade in this industry is by prohibiting such practices, thereby striking at the causes for restraints of trade and *monopolistic conditions* and dealing with such conditions in their incipiency.

"Furthermore, such abuses were so prevalent before prohibition that they were regarded in a large measure as responsible for the evils which led to prohibition. (See Report of the National Commissioner on Law Observance and Enforcement (1931), H. Doc. No. 722, 71st Cong., 1st sess., P. 6' and Fosdick and Scott, Toward Liquor Control (1933), pp. 42-43.) The prohibition of these practices will, accordingly, not only *prevent monopoly* and restraint of interstate trade but will also tend to eliminate or mitigate certain incidental social evils, such as those which have necessarily followed the forced increase in alcoholic-beverage sales resulting from the "tied-house'."

APPENDIX "D"

Aug. 15, 1947.

Sir:

There is transmitted herewith a draft of a proposed bill, "To amend the Federal Alcohol Administration Act, as amended."

The proposed bill would: (1) amend section 5 (c) of the Federal Alcohol Administration Act (U. S. C., title 27, sec. 205 (c)) to make conditioning of the purchase of any distilled spirits, wine or malt beverages upon, or "tying in" such purchase with, the purchase of any other distilled spirits, wine or malt beverages an unlawful inducement under that subsection; and (2) amend section 4 (g) of that Act (U. S. C., title 27, sec. 204 (g)) to make more definite and certain the time for the automatic termination of basic permits in cases of transfer through acquisition of control of the permittee.

The first proposed amendment is designed to bring so-called "tie-in" sales within the prohibitions of the Act. During the period of wartime scarcities the practice of "tie-in" sales grew up and flourished in the liquor industry. Under this practice suppliers of liquor to trade buyers made the purchase of scarce items such as whiskey, especially the more popular brands of whiskey, conditional upon the purchase by such buyers of other distilled spirits or wines which were in more plentiful supply and for which there was less consumer demand. For example, a retail dealer or a wholesale dealer desiring to make a purchase of whiskey urgently needed in his business would be required by the distiller or other supplier, as a condition of such purchase, to buy an equal or greater quantity of other

distilled spirits or wines which he did not want and for which he had no market. *Transactions of this nature made it necessary for the Department to determine whether such practices violated the provisions of the Federal Alcohol Administration Act, as amended, directed against unfair competition and unlawful practices. The Department reached the conclusion that such practices violated the provisions of sections 5 (a) and 5 (b) of the Act (U. S. C., title 27, secs. 205 (a) and 205 (b)) where the transactions were of a nature to affect interstate or foreign commerce. In the absence of a provision in the statute expressly dealing with "tie-in" sales, however, it was decided to institute proceedings for the revocation or suspension of the basic permits of suppliers instead of attempting criminal prosecutions.* Such proceedings were instituted in numerous cases, with the result that many suppliers agreed in writing to discontinue such practices. *This disposition of the cases was due to doubt on the part of the Department as to whether violations of the statute could be established through the "tie-in" sales.* It was contended by members of the industry that "tie-in" sales were not within the purview of sections 5 (a) and 5 (b) and that those sections were designed to prevent the creation of exclusive outlets and tied-houses only. *In view of the situation it is believed the Act should be so amended as definitely to vest the Department with authority to act in such cases. It is proposed to accomplish this result by adding at the end of section 5 (c) a new cause as follows:*

"(c) by conditioning the purchase of any distilled spirits, wine, or malt beverages upon, or 'tying in' such purchase with, the purchase of any other distilled spirits, wine, or malt beverages; or"

This proposed amendment has been tacked on to section 5 (c) of the Act for the reason that the prohibitions of this section, unlike those of sections 5 (a) and 5 (b), run to transactions with any "trade buyer", which term as defined in the Act includes both wholesale and retail dealers.

The second proposed amendment is deemed advisable on account of a ruling made by a Circuit Court of Appeals in *Mid-Valley Distilling Corporation v. Louis De Carlo, Acting Supervisor Alcohol Tax Unit, District No. 3* (C. C. A., 3rd, No. 9232, filed April 29, 1947), involving the automatic termination of a basic permit. Section 4 (g) of the Federal Alcohol Administration Act (U. S. C., title 27, sec. 204 (g)), the pertinent provisions of which are hereinafter quoted, provides for the automatic termination of basic permits where there is transfer by operation of law or through acquisition of control of the permittee. This provision was so construed by the court as to continue in effect a basic permit where there had been successive transfers of control of the permittee through acquisition of stock ownership and an application for a new permit had been made within thirty days after each such change. This construction will defeat the purpose of the Act because under it a permit could be continued in existence indefinitely by the engineering of another change of control each time before the application covering the previous change could be considered and acted upon. Under such circumstances it would be very difficult, if not im-

possible, to prevent the permit from failing into the hands of bootleggers and other law violators. Under the ruling of the case cited above, and if other Circuit Courts of Appeal should follow that decision, the administration of the permit system would be very seriously affected. In order to forestall such a situation the Department believes the provision should be amended to eliminate any question regarding its meaning.

Section 4 (g) of the Act in pertinent part declares that

> "if transferred by operation of law or if actual or legal control of the permittee is acquired, directly or indirectly, whether by stock ownership or in any other manner, by any person, then such permit shall be automatically terminated at the expiration of thirty days thereafter: *Provided*, That if within such thirty-day period application for a new basic permit is made by the transferee or permittee, respectively, then the outstanding basic permit shall continue in effect until such application is finally acted on by the Secretary of the Treasury."

The purpose here was to have basic permits automatically terminate in cases of transfer by operation of law or through acquisition of control of the permittee at the expiration of thirty days after the transfer or change of control occurred, except that if the transferee or the permittee (in case of change of control) filed an application for a new basic permit within such thirty-day period then

the old basic permit would continue in effect until final action was taken on *such application.*

The legislative history of section 4 (g) of the Act indicates that it was the intention of the Congress to provide for the continuance of the old permit in such cases for a limited time only, pending application for a new permit and action thereon. (1935) H. R. Rpt. No. 1542, 74th Cong., 1st Sess. 9-10. It was apparently not contemplated that the old permit should continue in effect indefinitely through successive transfers by operation of law or acquisitions of actual or legal control, merely if an application for a new permit were filed within thirty days after each such change. While such continued existence of the permit through successive transfers by operation of law may not be hazardous, the contrary is true in respect of successive acquisitions of actual or legal control of the permittee because this would afford a means to bootleggers and other law violators to evade the permit system. In view of the court ruling, and in order to avoid further controversy on the point, and, possibly, a serious impediment to effective administration of the permit system, it is believed that section 4 (g) should be so amended as to make the time of the termination of the permit in cases where actual or legal control of the permittee is acquired by stock ownership or other means more definite and certain. This may be done by adding at the end of section 4 (g) a new proviso as follows:

> "*Provided further*, That if during such thirty-day period or during the pendency of such application the actual or legal control of the permittee shall be acquired by stock ownership or in any other man-

ner, then, notwithstanding the provisions of section 9 (b) of the Administrative Procedure Act (Public Law 404, Seventy-ninth Congress; 60 Stat. 242), the outstanding permit shall automatically terminate thereupon."

With respect to the phrase in the proposed proviso, "notwithstanding the provisions of section 9 (b) of the Administrative Procedure Act (Public Law 404, Seventy-ninth Congress; 60 Stat. 242)", section 9 (b) of the Administrative Procedure Act provides, in part, that in any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency. Section 12 of the Administrative Procedure Act provides that no subsequent legislation shall be held to supersede or modify the requirements of that Act except to the extent that such legislation shall do so expressly. In order to eliminate any question arising as to the application of section 9 (b) to the automatic termination of permits contemplated by the proposed amendment, express language has been included to remove any doubt in the matter.

It is the view of the Department that the proposed amendments will strengthen the Federal Alcohol Administration Act and enactment of the bill is recommended.

There is enclosed for your convenient reference a comparative type showing the changes in existing law made by the proposed bill. It is requested that you lay the proposed bill before the Senate. A similar bill has been transmitted to the Speaker of the House of Representatives.

The Department has been advised by the Bureau of the Budget that there is no objection to the submission of this proposed legislation to the Congress.

Very truly yours,

(Signed) A. L. M. WIGGINS,
Acting Secretary of the Treasury.

The President of the Senate

AT:L:WCH:
KMcD:HAR:ma 5/8/47

[Identical letter sent to The Speaker of the House of Representatives]

[Emphasis ours]